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70-298

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1843

ARTHUR FULLER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No. .....

ARTHUR FULLER,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Arthur Fuller, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit rendered in these proceedings on April 30, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, as yet unreported, appears as Appendix A to this petition. The said Court of Appeals denied the petitioner's petition for rehearing on May 20,

1971. The order denying the petition for rehearing appears as Exhibit B to this petition. The opinion and judgment of the said Court of Appeals affirmed the judgment of the United States District Court for the District of South Carolina.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 30, 1971. A timely petition for rehearing was filed and was denied by the said Court of Appeals on May 20, 1971. This petition for writ of certiorari is to review the judgment of the said Court of Appeals in a criminal case and is filed less than thirty days after the order of the said Court of Appeals denying the petitioner's petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1), which said statutory provision is believed to confer jurisdiction on this Court.

QUESTIONS PRESENTED

The petitioner was tried and convicted in United States District Court for the District of South Carolina of violating 18 U.S.C., Section 371, 18 U.S.C., Section 1052 and 18 U.S.C., Section 1084. The questions presented are:

1. Whether the affidavit supporting the search warrant issued by the U.S. Commissioner at Birmingham, Alabama, was a sufficient showing of probable cause for the issuance of the search warrant under the rules announced by this court in *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and *Spinelli* v. *United States,* 393 U.S. 410 (1969).

2. Whether the search warrant authorizing the search of the petitioner's residence for "bookmaking records and waging paraphernalia" authorized the Federal agents conducting the search to intercept tele-

phone calls received at the petitioner's residence during the course of the search.

3. Whether the evidence presented by the Government was sufficient to support a conviction of the defendant under each count of the indictment.

4. Whether the petitioner was entitled to have introduced into evidence a written statement of a prosecution witness contradicting his testimony from the witness stand.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment V:

No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * * and to have the assistance of counsel for his defense.

United States Code, Title 18, Section 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud

the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

United States Code, Title 18, Section 1084 (a):

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event on contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

United States Code, Title 18, Section 1952:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and

(3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b). As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Rule 41 (c), the Federal Rules of Criminal Procedure:

A warrant shall issue only on affidavit sworn to before the Judge or Commissioner in establishing the grounds for issuing the warrant.

STATEMENT OF THE CASE

The petitioner was indicted along with Thomas Lynn Porter, Larry Spears, and Clyde Troulias in a three count indictment. Count One charged each defendant with a conspiracy prohibited by 18 U.S.C., Section 371, to violate 18 U.S.C., Sections 1052, 1084 and 2. Count Two charged each with a violation of 18 U.S.C., Section 1952, and Count Three charged each with a violation of 18 U.S.C., Section 1084. All of the counts related to interstate transmission by telephone of wagers or gambling information.

Prior to trial the petitioner filed a motion to suppress certain evidence seized from his residence by F.B.I. agents under the authority of a search warrant issued by the U. S. Commissioner at Birmingham, Alabama. The motion was denied and at the trial the fruits of this search were admitted into evidence over the petitioner's objections. The search warrant was issued on the affidavit of F.B.I. Agent Osborn. The entire affidavit of Osborn is set out in the opinion of the Court of Appeals which is Exhibit A to this petition.

The search warrant authorized the search of the petitioner's residence for "certain property, namely, bookmaking records and wagering paraphernalia, consisting of, but not limited to, accounting sheets, rundown sheets, betting slips, recap sheets, sports information papers, miscellaneous line notations, line sheets, books of account, checks, money orders, and United States currency . . ."

During the course of the search the F.B.I. agents conducting the search answered incoming calls on two telephones located in the petitioner's residence. In answering these calls the agents attempted to imitate the manner and style of speech usually employed by gamblers and actually gave wagering information to callers when the same was requested. Over the petitioner's objections, the trial court permitted these agents to testify to the content of the telephone calls which they answered during the course of the search.

In the course of the trial of this case the Government presented the testimony of Mr. Cross, an employee of the F.B.I. Laboratory in Washington. This witness stated that in his opinion certain items taken from the petitioner's residence and received in evidence were gambling paraphernalia. This witness had previously prepared a report on the letterhead of the F.B.I. Laboratory in which he had expressed an opinion that the absence of certain information "precludes identification" of these documents as gambling paraphernalia. The witness acknowledged that he had prepared this written report and acknowledged its inconsistency with his testimony. The District Judge sustained the Government's objection to the offer of the written report as impeachment evidence and refused to permit the jury to view it.

The jury acquitted Troulias and convicted Porter, Spears, and the petitioner.

The evidence against the petitioner consisted of the following:

1. Three items seized during the search of the petitioner's residence. These items were a basketball schedule (an item of general circulation), a list of numbers not otherwise related which the F.B.I. Laboratory expert stated at one time was not identifiable as gambling paraphernalia and at another time stated could possibly be interpreted as a record of wagers, and $710.00 in United States currency.

2. The fact that when the F.B.I. agents conducting the search answered ringing telephones at the petitioner's residence during the course of the search some of the callers requested the "line". None of these calls were identified as interstate calls and none of the callers asked to place any wagers.

3. The records of the telephone company at Greenville, South Carolina, showed that 73 calls were made from public pay telephones in the Greenville, South Carolina, area to the two telephone numbers in the petitioner's residence between July 1968 and February 1969. The records do not show the identity of the persons making the calls or the identity of the persons receiving the calls. No evidence was presented showing that the petitioner was at his residence when any of these calls were received and the records do not reflect the content of any of the conversations.

4. Surveillance evidence placed the defendants Porter or Spears in telephone booths from which four of the calls referred to under Item 3, above, were made at the approximate time these calls were made The surveillance evidence did not show the content of the calls and did not show the identity of the person to whom either Porter or Spears talked.

The only direct evidence relating to conduct of the petitioner was the testimony about the search of his residence on March 8, 1969. At that time he was not observed

engaging in any gambling activity. There was no evidence of earlier activity on his part. The evidence did not show that he was acquainted with either of the codefendants (Porter and Spears) who were convicted along with him. The evidence did not show that he was present in his residence at the time any of the telephone calls from Greenville, South Carolina, reflected by the telephone company records were made. The Government offered no evidence of the content of any telephone conversations between Greenville, South Carolina, and the petitioner's residence. Neither did the evidence show the content of any telephone conversation engaged in by one of the other codefendants.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals for the Fourth Circuit upholding the validity of the search warrants issued for the search of petitioner's residence is contrary to the decisions of this Court in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969).

The opinion of the Court of Appeals concludes that the affidavit of F.B.I. Agent Osborn (which is set out in full in Appendix A to this petition) is a sufficient showing of probable cause to justify the issuance of a search warrant. The opinion points out that the affidavit contains informant information from two sources, one a Birmingham informant who supplied his information directly to the affiant, and the other, a Greenville, South Carolina, informant who supplied his information not to the affiant but to F.B.I. Agent Haas in Greenville, who, in turn, supplied it to the affiant. The Court of Appeals properly concludes that the Birmingham informant's tip does not meet the *Aguilar* test and must be disregarded because the in-

formant does not state the factual background for his information. It concludes, however, that the Greenville informant's tip sufficiently meets the *Aguilar* and *Spinelli* tests and supplies a valid basis for the search warrant. It is this conclusion which we submit is erroneous.

The Greenville informant's information is set out in paragraph III of the affidavit. It does not mention the petitioner by name and does not otherwise identify him. The informant's only reference to any connection between codefendants Porter and Spears and Birmingham, Alabalma, is an assertion that "Porter and Spears were receiving their line information from Birmingham, Alabama". This statement is the only link the informant provides between Porter and Spears and Birmingham, Alabama. The informant does not state the factual background, i.e., whether he had actually witnessed Porter and Spears receiving line information from Birmingham, Alabama or whether this assertion is a product of his own speculation or is a mere rumor. As such, it does not meet the standard required by *Aguilar* v. *Texas, supra,* and *Spinelli* v. *United States, supra,* for failure to state the factual background from which the informant acquired his knowledge.

Neither does the affidavit satisfy the other prong of the *Aguilar* test. It states no facts to justify a conclusion that the South Carolina informant's tip was credible. It must be noted that the South Carolina informant did not supply his information directly to Osborn, the affiant. He supplied it instead to Haas, who supplied it to the affiant. It becomes, then, hearsay twice removed and Haas' assertion that the informant had "furnished reliable information in the past" is hearsay as to the affiant. The *Aguilar* and *Spinelli* decisions require some factual background for the conclusion that an informant is credible, and it would seem that this is especially important in this case where

the informant's tip was hearsay twice removed as to the commissioner who was required to consider its effect. For these reasons we submit that the search warrant was issued in violation of the Fourth Amendment to the United States Constitution and Rule 41 (c), of the Federal Rules of Criminal Procedure.

2. By its decision the Court of Appeals has approved a general search warrant, contrary to the decisions of this Court in *Stanford* v. *Texas*, 379 U.S. 476 (1965), and *Marron* v. *United States*, 275 U.S. 192 (1927), in holding that the search warrant authorized the officers conducting the search to answer and receive incoming telephone calls at the petitioner's residence during the course of the search.

The Fourth Amendment is very specific in its requirement that a lawful search can only be conducted on the authority of a warrant "particularly describing the place to be searched, and the person or things to be seized". This Court has held that the warrant which authorizes a search for and seizure of specified items does not authorize a search for and a seizure of different items. *Stanford* v. *Texas, supra, Marron* v. *United States, supra.* In this case the search warrants authorized a search for "bookmaking records and wagering paraphernalia consisting of, but not limited to, accounting sheets, rundown sheets, betting slips, recap sheets, sports information papers, miscellaneous line notations, line sheets, books of account, checks, money orders, and United States Currency, which property has and is being used in violation of Sections 371, 1084, and 1052 of Title 18, U.S. Code." The search warrant does not mention telephones, telephone calls, telephone conversations, or other verbal statements.

In *Katz* v. *United States*, 389 U.S. 347 (1967); *Berger* v. *New York*, 388 U.S. 41 (1967); and *Wong Sun* v. *United*

States, 371 U.S. 471 (1963), this Court has recognized verbal statements as well as tangible items such as papers, etc., as being protected by the Fourth Amendment from unlawful searches. The conclusion drawn from the *Katz, Berger* and *Wong Sun* decisions is that verbal statements are a category of evidence that may not be seized except where there has been compliance with the Fourth Amendment requirements. Since the search warrant limits itself by its descriptive language to tangible bookmaking records and wagering paraphernalia its scope clearly does not include intangible verbal statements.

It should be noted that the F.B.I. agents who conducted this search knew in advance that they were going to answer the telephones in the petitioner's residence if they rang during the search. Several of the agents had specifically prepared themselves in advance by acquiring the knowledge necessary to give out gambling information in response to any requests that might be received from callers. It would seem that the Fourth Amendment would unquestionably require that the search warrant authorize the seizure of telephone calls or verbal statements under these circumstances. For these reasons we submit that the Court of Appeals erred in holding that the content of these intercepted telephone calls was admissible evidence against the petitioner.

3. The decision of the Court of Appeals concluded that the evidence was sufficient to sustain a conviction of the petitioner under each of the three counts of the indictment. This conclusion has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. The petitioner was convicted under two substantive counts which charged him with using a telephone to transmit wagers or wagering information in interstate commerce in

violation of Sections 1084 and 1952 of Title 18, United States Code. He was charged in a conspiracy count with conspiring with 3 other persons to violate the same sections.

Although the petitioners strenuously argued in the Court of Appeals that the evidence was insufficient to sustain his conviction the Court of Appeals peremptorily disposes of this argument by a one sentence assertion, "After examining the record, we conclude that there was sufficient evidence for the jury to find every element beyond a reasonable doubt . . . ." The opinion does not analyze the evidence and does not summarize the evidence which it finds to support the conviction.

As to the substantive counts, it is the petitioner's position that no conviction can be had for either charge unless the evidence establishes (1) that the petitioner engaged in an interstate telephone conversation and (2) that the subject of this interstate telephone conversation was wagering. The evidence in this case does not establish that the petitioner ever engaged in an interstate telephone conversation and it does not establish the content of any interstate telephone conversation carried on at the defendant's residence or at any other place. Therefore, it would seem that the Government's evidence has failed to establish the *sine qua non* for a conviction under either Section 1084 or 1952.

No inference of guilt of the substantive counts arises from any of the evidence presented by the Government. In order to have an inference of guilt from this evidence it would be necessary to (1) infer that the petitioner participated in one of the interstate telephone calls shown by telephone company records merely because the call was made to a telephone in his residence and (2) infer that wagers or wagering information, or other information necessary for carrying on of an illegal gambling business, was

transmitted in the telephone call which it is inferred that the defendant participated in. This, of course, is piling an inference upon an inference to prove a fact essential for conviction and is not permissible. *Direct Sales Co.* v. *United States,* 319 U.S. 703 (1943). The decision of the Court of Appeals permits this stacking of inferences and in doing so has rendered a decision contrary to a decision of this Court.

To prove the conspiracy charge against the defendant the Government offered no additional evidence with respect to the petitioner. The only additional evidence offered was the fact that the codefendants, Porter and Spears, were engaged in a bookmaking business in the State of South Carolina. There was no evidence that petitioner ever communicated with either Porter or Spears. The other alleged member of the conspiracy, Troulias, was acquitted by the jury. There is entire absence of evidence of communication between petitioner and Porter and Spears and no evidence of an existence of an agreement between them to violate Sections 1084 and 1952 of Title 18, U. S. Code. A conviction for conspiracy requires proof of an agreement to commit an offense against the laws of the United States and the existence of the agreement must be established by evidence, not left to speculation or conjecture. *Ingram* v. *United States,* 360 U.S. 672 (1959); *United States* v. *Di Re,* 332 U.S. 581 (1947). In this case the existence of a conspiracy and the participation of the petitioner in it is necessarily the product of speculation and surmise because the evidence does not sustain it.

The petitioner submits that in affirming his conviction in the District Court, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings. The petitioner requests this Court to exercise its power of supervision and review the sufficiency of the evidence to sustain his conviction as to each count.

4. The decision of the Court of Appeals affirmed the ruling of the District Court which refused to admit into evidence a written statement of a prosecution witness which was contradictory to his testimony from the witness stand. This ruling was contrary to the decision of this Court in *Gordon* v. *United States*, 344 U.S. 414 (1952).

One of the points argued on this appeal to the Fourth Circuit was the ruling of the District Court sustaining the Government's objection to defendant's Exhibit F. This Exhibit was a report prepared by the F.B.I. Laboratory of its analysis of certain documents seized from the petitioner's residence. The report concluded that the seized items could not be identified as gambling paraphernalia. At the trial of the case the Government offered testimony of Cross, the expert from the F.B.I. Laboratory who prepared the report. On direct examination he stated that in his opinion one of the documents referred to in the report was gambling paraphernalia. He acknowledged that he prepared the report and acknowledged that it was inconsistent with his testimony from the witness stand. The District Court, however, refused to receive the document as impeachment evidence and refused to allow the jury to view it. In *Gordon* v. *United States, supra,* this Court held that a written contradiction is admissible for impeachment purposes even though the witness admits the contradiction.

Even though this point was argued in the Court of Appeals, the opinion of the Court of Appeals does not mention this issue. The opinion does, however, affirm the judgment of the District Court, so tacitly the Court of Appeals is approving the ruling of the District Court. This ruling is contrary to this Court's decision in *Gordon* v. *United States, supra.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. MILLS
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Birmingham, Alabama 35203
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari on the Honorable John K. Grisso, United States Attorney for the District of South Carolina, by mailing a copy of the same to him in the United States Mail, properly addressed and with First Class postage prepaid, the 16th day of June, 1971.

Of Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,205
United States of America,
Appellee,

versus

Arthur Fuller,
Appellant.

No. 14,357
United States of America,
Appellee,

versus

Thomas Lynn Porter,
Appellant.

No. 14,358
United States of America,
Appellee,

versus

Larry Spears,
Appellant.

Appeals from the United States District Court for the District of South Carolina, at Greenville. Charles E. Simons, Jr., District Judge.

(Argued December 11, 1970 Decided April 30, 1971.)

Before SOBELOFF, WINTER and CRAVEN, Circuit Judges.

Kale R. Alexander (David A. Fedor on brief) for Appellants in Nos. 14,357 and 14,358; William H. Mills for

Appellant in No. 14,205; and Joseph O. Rogers, Jr., United States Attorney, (Thomas F. Batson and D. Gene Rickenbaker, Assistant United States Attorneys, on brief) for Appellee.

CRAVEN, Circuit Judge:

Appellants, Arthur Fuller, Thomas Lynn Porter, and Larry Spears, were indicted along with a fourth codefendant, Clyde Troulias, on two counts of violations of federal statutes prohibiting the use of interstate telephone facilities for gambling activities and a third count of conspiring together to commit the crimes charged in the substantive counts. Porter and Spears are residents of Greenville, South Carolina, and Fuller and Troulias are residents of Birmingham, Alabama. FBI investigation in both locations produced evidence tending to show that bookmaking operations on sporting events were being operated by Porter and Spears out of two trailers they occupied in Greenville and by Fuller and Troulias out of Fuller's home in Birmingham. There was also indication that gambling information or bets were exchanged by the four defendants via long distance telephone calls made from pay telephones in Greenville to Fuller's residence and Troulias' sister's residence in Birmingham. Simultaneous searches were made of the trailers in Greenville and Fuller's home pursuant to search warrants. After a lengthy trial, the jury acquitted Troulias and found the appellants guilty on all three counts.

I.

Appellant Fuller argues that there was an insufficient showing of probable cause for the issuance of the warrant for the search of his home in Birmingham.[1] The govern-

1. The validity of the Greenville search warrant is not attacked on appeal.

ment contends that the written affidavit submitted by an FBI agent, coupled with oral testimony given by the agent under oath before the United States Commissioner who issued the warrant, was sufficient. Fuller argues that Rule 41(c), Fed. R. Crim. P., requires probable cause to be based solely on a written affidavit and that supplemental oral testimony is proscribed. We need not decide whether oral testimony can be used to supplement a written affidavit under Rule 41(c) since we conclude that the written affidavit alone was sufficient. The affidavit contained the following statements:[2]

> (1) An unidentified informant, who had provided reliable information in the past, told the affiant, FBI Agent Osborne, that "Clyde Troulias was the biggest bookie in the Birmingham area"; that he was taking bets on sporting events; and that he was working with Arthur Fuller in his booking operation.
>
> (2) Agent Osborne telephoned Clyde Troulias at his sister's residence and was told that he could be reached at Arthur Fuller's residence. Agent Osborne telephoned Arthur Fuller's residence and Clyde Troulias answered the phone.
>
> (3) Agent Osborne personally observed Clyde Troulias and Arthur Fuller in the company of known gamblers. FBI records showed Clyde Troulias was convicted of a gambling offense in 1960 and arrested for bookmaking in 1967 after a raid by state officers on the residence of his sister.
>
> (4) Agent Osborne was informed by FBI Agent Haas, who was conducting a gambling investigation in Greenville, South Carolina, that an unidentified informant, who had given Agent Haas reliable information in the past, had observed Thomas Lynn Porter and Larry Spears taking bets and giving out line information at two trailers occupied by them in Green-

2. The affidavit is recited in full in the appendix.

ville. The informant also told Agent Haas that Spears and Porter were receiving line information from Birmingham.

(5) Agent Haas and other FBI agents observed Porter and Spears in five different telephone booths in Greenville at times when four calls were placed to the residence of Clyde Troulias' sister, Annie Lou Troulias, in Birmingham and five calls were placed to the residence of Arthur Fuller in Birmingham. The four calls to the Troulias' residence were made in November and December of 1968. The five calls to the Fuller residence were made in January and February of 1969. A survey of subpoenaed telephone records for these same five telephone booths showed 259 calls from the booths in Greenville to one of two phones at the Birmingham residence of Troulias' sister between August 1968 and January 20, 1969. The records also showed 75 calls from the five booths to the Birmingham residence of Arthur Fuller between January 18, 1969, and February 22, 1969.

A magistrate issuing a search warrant may rely on the hearsay information provided by an unidentified informant if "a substantial basis for crediting the hearsay is presented." *Jones* v. *United States*, 362 U.S. 257, 269 (1960). In order to show a substantial basis for crediting the hearsay, the affidavit must pass the two-pronged test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964). The magistrate must be informed of (1) the underlying circumstances on which the affiant concludes that the informant is credible and (2) the underlying circumstances on which the informant based his conclusion that the person whose residence is to be searched is engaged in criminal activity. If the informer's tip is found inadequate under *Aguilar*, the magistrate may yet find probable cause to believe the tip if it can "fairly be said that the tip . . . when corroborated by independent sources, is as trustworthy as a tip

which would pass Aguilar's tests without independent corroboration." *Spinelli* v. *United States,* 393 U.S. 410, 415 (1969).

The affidavit in this case contains information supplied by two informants, one in Greenville and one in Birmingham. The Birmingham informant's tip is not supported by the circumstances on which the informant based his conclusion that "Clyde Troulias was the biggest bookie in the Birmingham area" and thus does not meet the *Aguilar* tests. It must, therefore, be disregarded. The Greenville informant's tip is another matter.

The credibility of the Greenville informant is supported by a statement that he had previously given Agent Haas reliable information. We think that a magistrate is entitled to infer that an informant who has provided information in the past which has proved to be accurate will probably continue to give accurate information in the future. We also think that the report of information from one named FBI agent to another agent who is the affiant, when both are working together on a joint investigation, is inherently credible. See *United States* v. *Ventresca,* 380 U.S. 102, 111 (1965). The Greenville informant's statement that Porter and Spears were taking bets and giving out line information was based on his personal observation, and, thus, this portion of his information meets both of the *Aguilar* tests. The informant's statement that Porter and Spears were receiving their line information from Birmingham is not reported as being based on his personal observation. However, we feel that the statement regarding the large volume of phone calls made from five phone booths in Greenville to the Fuller and Troulias residences plus the statement that Porter on some occasions and Spears on others were seen in the phone booths when nine of these calls were placed supports an inference that the calls were

made by Porter and Spears to Troulias and Fuller in connection with Porter and Spears' gambling activities. All of the calls before January 18 were made to the residence of Annie Lou Troulias and all of the calls after January 20 were made to the residence of Arthur Fuller. This supports Agent Osborne's conclusion in the affidavit that the Birmingham end of the gambling operation was transferred from the Troulias residence to the Fuller residence about January 19, 1969. During the period of January 18, 1969, to February 22, 1969, the calls from the five Greenville phone booths to the Fuller residence in Birmingham averaged more than two a day, which suggests something other than the casual conversation of friends.

Only probability and not a prima facie showing of criminal activity is required to sustain a search warrant. *Beck* v. *Ohio*, 379 U.S. 89 (1964). A reviewing court is not to substitute its judgment as to probable cause, but only to determine whether there was a substantial basis for the magistrate's determination of probable cause. *Jones* v. *United States*, 362 U.S. 257, 271 (1960). We conclude that, based on the written affidavit alone, there was a substantial basis for the magistrate to conclude that Porter and Spears were probably engaged in gambling activity, that they were probably assisted or joined in this activity by Clyde Troulias and Arthur Fuller in Birmingham, that the link between Greenville and Birmingham was probably made by long distance phone calls, that the locus of the Birmingham end of the operation was probably shifted from the Troulias residence to the Fuller residence, and that therefore gambling paraphernalia would probably be located at the Fuller residence.

II.

During the search of Fuller's residence, two FBI agents answered two telephones located in the bedroom.

The agents answered the phones for 25 minutes. The callers identified themselves by number and asked for the "line".[3] The agents, who had been prepared to do so, supplied the callers with the current "line" information. Testimony of the conversations was introduced into evidence.

Fuller argues that this was a seizure of the conversations and was outside the scope of the search warrant relying on *Marron* v. *United States,* 275 U.S. 192 (1927), and *Stanford* v. *Texas,* 379 U.S. 476 (1965).

Marron was a prohibition case involving the execution of a search warrant which authorized searching for and seizing "intoxicating liquors and articles for their manufacture." 275 U.S. at 193. When the prohibition agents raided the place, they found a speak-easy, not a still. In addition to discovering some liquor, they seized ledger books and bills. The Court said the ledger books and bills were outside of the scope of the warrant, but were admissible as material seized incident to a lawful arrest.

But that is not this case. The search warrant in *Marron* was very specific and the questioned items seized were wholly different in nature and kind from the items listed. In this case, the warrant authorized searching for and seizing "bookmaking records and wagering paraphernalia consisting of, but not limited to, accounting sheets, rundown sheets, betting slips, recap sheets, sports information papers, miscellaneous line notations, line sheets, books of account, checks, money orders, and United States Currency . . . ." The description is necessarily general and clearly contemplates that material relating to gambling activity but not precisely described might be seized. The intent of the generalized description is clearly to permit the seizure of any items directly related to the appellants' booking opera-

3. We are told the phrase "line" refers to the predicted point spread between teams in athletic contests.

tion. The telephone calls answered by the agents were clearly a part of appellants' booking operation and, therefore, we think within the scope of the general language of the warrant.[4]

Nor do we think that a warrant which is limited to the seizure of items which are directly related to a booking operation to be the kind of general search prohibited by the Fourth Amendment. This is not a case where "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude [because] the 'things' are books, and the basis for their seizure is the ideas which they contain." *Stanford v. Texas*, 379 U.S. 476, 485 (1965). The agents executing the warrant in this case were empowered to seize only a limited class of things, that which was related to a bookmaking operation. "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods." *Nuckols* v. *United States*, 99 F.2d 353, 355 (D.C. Cir. 1938).

III.

On February 7, 1969, during the surveillance of Porter and Spears in Greenville, FBI Agent McNamara overheard a portion of a call Spears was making from a telephone booth. The door of the booth was closed, or nearly so, and Spears' back was to the glass door so that he was unaware of the listening agent. The agent was standing very near the booth, or at most two to four feet from it, and overheard the conversation unassisted by any amplifying or electronic surveillance equipment. The overheard conversation was not introduced into evidence, nor was it used in the affidavit to obtain the search warrants. Porter and

4. For recent interpretations of the *Marron* limitation see Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968); Anglin v. Maryland, ... F.2d ..... (4th Cir. 1970).

Spears argue that this was an unconstitutional seizure of the conversation within the rationale of *Katz* v. *United States*, 389 U.S. 347 (1967), and that all evidence and testimony developed subsequent to February 7, 1969, must be excluded as a tainted product of the unlawful seizure. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

The rationale of *Katz* is that the Fourth Amendment protects as private that which a person reasonably expects will be private. We think a person is not entitled to expect that his conversation in a telephone booth will not be heard and repeated if he speaks loudly enough to be overheard by the human ear (unassisted electronically) of someone standing outside the booth. "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of society. It is the kind of risk we necessarily assume whenever we speak." *Lopez* v. *United States*, 373 U.S. 427, 465 (1963) (dissenting opinion), quoted with approval in *Hoffa* v. *United States*, 385 U.S. 293, 303 (1966).

Although offered the opportunity to secure the testimony of the agent who actually listened, appellants did not do so and failed to establish the pertinent facts. We do not even know whether the telephone booth door was entirely closed. Whether the listening FBI agent was four feet from the panel wall of the booth or had his ear pressed tightly against it is not clear. Doubtless there is a risk of eavesdropping against which the law affords no protection, but whether pressing the ear up against the partition of a telephone booth goes beyond permissible surveillance and is so similar to electronic bugging as to be an invasion of privacy protected by the Fourth Amendment is not presented on this record. Compare *Ponce* v. *Craven*, 409 F.2d

621 (9th Cir. 1969); *United States* v. *Llanes*, 398 F.2d 880 (2d Cir. 1968).

As for the eavesdropped conversation, the record indicates that the listening agent learned only what he already knew, *i.e.*, that Spears was engaged in a gambling operation. The listening agent could not ascertain from the conversation to whom Spears was talking, nor even where the person was located. Since the overheard conversation did not reveal to the agents anything they did not already know, nor lead them to any evidence helpful to prove what they already knew, the doctrine of *Wong Sun* is clearly inapplicable, and if we assume a violation of *Katz*, there is no tainted material.

IV.

The appellants raise a number of other issues on appeal which require little discussion. Porter and Spears argue that the district court's denial of their motion for a continuance to allow them to examine the material seized from the Greenville trailers, and especially to allow them to have an expert examine a tape recording discovered in one of the trailers of phone conversations of Porter and Spears giving line information and accepting wagers, was error. The appellants have now had time to examine the evidence seized including an opportunity to test the tape recording. Absent a claim that they have discovered something that would materially further their defense, there is no showing that manifest injustice has resulted from an abuse of the district court's discretion in refusing to grant a continuance. See *Isaacs* v. *United States*, 159 U.S. 487 (1895).

All three of the appellants objected to the admission of the tape recording seized by the FBI from one of the Greenville trailers. Porter and Spears argue that it was outside the scope of the search warrant and could not have

been the subject of a search warrant because it was mere evidence rather than fruits or instrumentalities of the crime. Fuller argues that the tape was made prior to the date of the first alleged overt act in the conspiracy and thus should have been excluded as hearsay as to him. All three argue that no proper foundation was laid as to the conditions of its making and preservation in the same condition from recording to trial.

The language of the description of items to be seized in the Greenville warrant is identical to that in the Birmingham warrant. See Section *II* above. The tape recording was apparently made as a record of bets and is clearly within the description "bookmaking records and wagering paraphernalia." The distinction between mere evidence and fruits or instrumentalities was abolished in *Warden* v. *Hayden*, 387 U.S. 294 (1967). The rule limiting the admissibility of hearsay statements of co-defendants that Fuller relies on deals with situations where one conspirator has made a statement as to what another conspirator has done or said. The tape recording is not of that kind. There was no claim made that Fuller was involved in any of the activities mentioned on the tape so that the hearsay rule is not relevant. The tape was admissible as proof that Porter and Spears were engaged in gambling activity, a necessary element of Fuller's conspiracy conviction. Appellants' claim that a foundation had to be laid as to the making and preservation of the tape is based on cases where the party making the tape introduces it into evidence. Here the tape was found in Porter and Spears' possession and their voices are identified on it. The FBI agents through whose hands the tape passed testified that it had not been altered and its condition at the time of the trial was identical to that at the time of seizure. This we think was sufficient foundation for its accuracy.

All three appellants argue that the district court's instruction regarding their right not to testify focused the jury's attention on their failure to testify thus depriving them of the right. Absent a request not to give the instruction and absent an objection to it once it was given, the instruction was appropriate. *United States* v. *Smith*, 392 F.2d 302 (4th Cir. 1968).

Fuller argues that the evidence was insufficient to sustain his conviction and that the failure to grant his motion for a separate trial was an abuse of the district court's discretion. After examining the record, we conclude that there was sufficient evidence for the jury to find every element beyond a reasonable doubt and that the refusal of the motion for severance was not an abuse of discretion.

For the reasons stated, the judgment of the district court is

AFFIRMED.

AFFIDAVIT

Before Mildred F. Sprague, U. S. Commissioner for the Northern District of Alabama, Birmingham, Alabama, the undersigned, being duly sworn, deposes and states: That affiant is a Special Agent of the Federal Bureau of Investigation and has continuously held that position for the past twenty-five years. Affiant has been assigned to the investigation of gambling matters within the jurisdiction of the Federal Bureau of Investigation in the Birmingham area for the past eleven years. During that time, Affiant has been involved in more than 200 separate and distinct gambling investigations and as a result of this experience, Affiant has had the opportunity to examine the records commonly used by bookmakers.

That since July, 1968, confidential informants have spoken to Affiant personally about gambling and bookmak-

ing activities of CLYDE TROULIAS and ARTHUR FULLER and Affiant was in a position to judge the reliability of those informants. On other occasions, confidential informants have provided information about TROULIAS and FULLER to Special Agents of the Federal Bureau of Investigation in South Carolina, and at that time Affiant personally reviewed the information submitted by the South Carolina FBI and their informants, and from it made a personal judgment as to the informants' past reliability.

That Affiant, based on facts set forth in this affidavit, now has reason to believe, and does believe, that on the premises further described herein known as: 1133 Sherwood Forest Drive, Birmingham, Alabama, located in the Northern District of Alabama, there has been and are now concealed certain property, to-wit: bookmaking records and wagering paraphernalia consisting of, but not limited to, accounting sheets, rundown sheets, betting slips, recap sheets, sports information papers, miscellaneous line notations, line sheets, books of account, checks, money orders, and United States Currency, which property has and is being used in violation of Sections 371, 1084, and 1052 of Title 18, United States Code.

That Affiant, based on his experience in gambling matters, knows that bookmakers who operate interstate by telephone are known to use and have in their possession the paraphernalia described above.

That the premises are further described as:

> 1133 Sherwood Forest Drive, Birmingham, Alabama, a two-story brick residence.

The facts upon which this affidavit is based are as follows:

I. (a) A confidential informant known to me to have furnished reliable information in the past stated "CLYDE TROULIAS was the biggest bookie in the Birmingham area" and that he bets principally on football but also takes bets on basketball and baseball during their respective seasons.

(b) The same confidential informant further stated on or about the same date that CLYDE TROULIAS is presently working with ARTHUR FULLER in the booking operation in the Birmingham area.

(c) One example of the reliable information which this informant has supplied in the past was informing Affiant of known gamblers being in the Birmingham area during a specific weekend. The Affiant checked this information and personally observed the known gamblers previously noted by the informant.

II. (a) In February, 1969, Affiant had occasion to personally telephone Birmingham telephone number 836-5429, which is the residence of ARTHUR FULLER, located at 1133 Sherwood Forest Drive, Birmingham, Alabama, and CLYDE TROULIAS answered the phone.

(b) On February 27, 1969, Affiant personally telephoned number 322-6192, the telephone number of the sister of CLYDE TROULIAS, and a female answered the telephone, and when Affiant asked to speak to CLYDE TROULIAS, without giving his identity, he was informed that TROULIAS was not there but if desired he could call ARTHUR FULLER.

(c) For the past two years, Affiant has personally observed CLYDE TROULIAS in company with other known gamblers in the Birmingham area. He has also personally observed ARTHUR FULLER during the same period of time in the company of known gamblers in the Birmingham area.

(d) FBI Identification Record No. 418 273 A for CLYDE TROULIAS indicates a gambling conviction in 1960; and a bookmaking arrest in 1967 which arrest occurred after a State raid on the residence of his sister, ANNIE LOU TROULIAS, 2405- 36th Avenue North, Birmingham, Alabama.

III. Attached herein is an affidavit of WILLIAM P. HAAS concerning gambling activities in Charleston and Greenville, South Carolina.

In November, 1968, the Affiant received information that an interstate gambling investigation being conducted by WILLIAM P. HAAS, a Special Agent of the Federal Bureau of Investigation, had disclosed that known gamblers in the Greenville, South Carolina, area had been contacting individuals in the Birmingham, Alabama, area. Special Agent HAAS has been with the FBI continuously for the past six years and has been assigned to the investigation of gambling matters within the jurisdiction of the Federal Bureau of Investigation for approximately three years. Special Agent HAAS furnished Affiant with the following information:

(a) In November, 1968, a confidential informant known to Special Agent WILLIAM P. HAAS to have furnished reliable information in the past, stated that THOMAS LYNN PORTER and LARRY SPEARS were operating a bookmaking establishment in two trailers located on the outskirts of Greenville, South Carolina.

(b) The same confidential informant, who had personally been in the aforementioned trailers, had witnessed THOMAS LYNN PORTER and LARRY SPEARS accepting wagers and giving out line information.

(c) In February, 1969, the same confidential informant stated that PORTER and SPEARS were receiving their line information from Birmingham, Alabama.

(d) Physical surveillance of LARRY SPEARS and THOMAS LYNN PORTER in Greenville, South Carolina during November, 1968, through and including February 13, 1969, by WILLIAM HAAS and other Special Agents of the Federal Bureau of Investigation placed LARRY SPEARS and THOMAS LYNN PORTER in different telephone booths when the following telephone calls were made:

Date	Telephone Booth Number	Number Called
November 7, 1968	277-9813	322-6192, Birmingham, Ala.
November 26, 1968	277-9900	322-6192, " "
November 26, 1968	277-9874	322-6192, " "
December 10, 1968	277-9900	322-6192 " "
January 29, 1969	277-9900	836-3500 " "
February 6, 1969	277-9727	836-5429 " "
February 7, 1969	277-9902	836-3500 " "
February 7, 1969	277-9900	836-5429 " "
February 13, 1969	277-9927	836-5429 " "

IV. A survey of the subpoenaed telephone records of Southern Bell Telephone and Telegraph Company of Greenville, South Carolina, disclosed the following calls made from the pay stations mentioned in III (d) above:

Telephone Number	Call To	Subscriber	Number of Calls	Date
277-9727	323-3933	TROULIAS	37	8/18/68—1/19/69
277-9727	322-6192	TROULIAS	65	9/29/68—1/19/69
277-9727	836-3500	FULLER	10	1/18/69—2/21/69
277-9727	836-5429	FULLER	7	1/22/69—2/21/69
277-9874	323-3933	TROULIAS	2	12/21/68—1/11/69
277-9874	322-6192	TROULIAS	10	11/23/68—1/11/69
277-9874	836-5429	FULLER	5	1/25/69—2/19/69
277-9874	836-3500	FULLER	1	1/26/69
277-9902	323-3933	TROULIAS	10	8/22/68—1/10/69
277-9902	322-6192	TROULIAS	25	8/23/68—1/20/69
277-9902	836-5429	FULLER	5	1/20/69—2/22/69
277-9902	836-3500	FULLER	12	1/20/69—2/22/69
277-9900	323-3933	TROULIAS	23	11/ 3/68—1/18/69
277-9900	322-6192	TROULIAS	33	11/ 2/68—1/19/69
277-9900	836-5429	FULLER	4	1/16/69—2/15/69
277-9900	836-3500	FULLER	10	1/20/69—2/15/69
277-9813	323-3933	TROULIAS	11	11/16/68—1/15/69
277-9813	322-6192	TROULIAS	43	11/ 6/68—1/18/69
277-9813	836-5429	FULLER	10	1/20/69—2/15/69
277-9813	836-3500	FULLER	11	1/20/69—2/19/69

V. Telephone records of South Central Bell Telephone Company, Birmingham, Alabama, reflect that the telephone numbers 322-6192 and 323-3933 are listed to ANNIE LOU TROULIAS, sister of CLYDE TROULIAS, at 2405 - 36th Avenue North, Birmingham, Alabama; and 836-5429 is subscribed to an ARTHUR U. FULLER , 1133 Sherwood Forest Drive, Birmingham, Alabama, and 836-3500 is listed to WANDA FULLER , wife of ARTHUR FULLER, 1133 Sherwood Forest Drive, Birmingham, Alabama.

VI. The telephone records, shown in paragraph IV (above), indicate there were approximately 259 calls to the residence of CLYDE TROULIAS' sister between August, 1968, through and including January 20, 1969, and seventy-five (75) calls to ARTHUR FULLER's residence from January 18, 1969, through and including February 22, 1969.

VII. In February, 1969, the Affiant through investigative efforts and toll records from Greenville, South Carolina showing a change of calls leading him to believe that CLYDE TROULIAS had moved his gambling operation from 2405 36th Avenue North, Birmingham, Alabama, the residence of his sister, MRS. ANNIE LOU TROULIAS, to 1133 Sherwood Forest Drive, Birmingham, Alabama, the residence of ARTHUR FULLER. The move took place around January 19, 1969.

VIII. An analysis of the Telephone Company toll records obtained pursuant to a Grand Jury subpoena from the Southern Bell Telephone and Telegraph Company of Greenville, South Carolina, reveals generally a pattern of telephonic contacts which can be interpreted as indicative of a gambling enterprise. Affiant, based on his experience investigating interstate bookmaking, knows it is common practice for bookmakers not to use their own telephone number when making interstate calls, and it is common practice to use pay phones not listed to them personally.

IX. Records of Greenville, South Carolina, Police Department indicate THOMAS LYNN PORTER has been arrested in 1959, 1960 and 1961 for selling lottery tickets. In 1967, PORTER was convicted of a gambling offense which he is presently appealing to the United States Supreme Court.

Therefore, Affiant has reason to believe, that the divers bookmaking records and wagering paraphernalia are being used by CLYDE TROULIAS and ARTHUR FULLER, and other persons unknown to Affiant, all of whom are engaged in the bookmaking business, all of whom transmit bets and wagers and information assisting in the placing of bets and wagers in interstate commerce, in violation of Section 1084, Title 18, United States Code, all of whom use facilities in interstate commerce to carry on a business enterprise involving gambling violations contrary to the laws of the State of Alabama in violation of Section 1952, Title 18, United States Code, and all of whom have conspired among themselves and with others to violate Sections 1084 and 1952 in violation of Section 371 of Title 18, United States Code.

Further Affiant saith not.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,205

United States of America,
Appellee,

versus

Arthur Fuller,
Appellant.

Order

(Filed May 20, 1971)

After consultation with Judge Sobeloff and Judge Winter, and with their approval, the petition for rehearing is denied.

For the Panel:
/s/ J. Braxton Craven, Jr.